No. 21,786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. J. BUCKNER CORPORATION, dba UNITED ENGINEERING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.
PRELIMINARY STATEMENT.

Petitioner incorporates by reference herein as though set forth in full parts I, II, III and IV of its opening brief on file herein.

II.
ADDITIONAL STATEMENT OF THE CASE.

The union was consulted both before and after the discharge of Szczesniak [Tr. p. 246, lines 1-16]. The workers committee did meet and discuss the Szczesniak grievance [Tr. p. 224, line 3, to p. 225, line 20; p. 231, line 4, to p. 232, line 6]. An effort was made to inform member Szczesniak of the committee meeting [Tr. p. 232, line 6, to p. 233, line 4].

III.

ARGUMENT.

A. It Was Error for the Board and the Trial Examiner Not to Defer to the Decision of the Grievance Committee and to Conclude That the Board Was Not Deprived of Jurisdiction by Such Decision.

Petitioner seeks this Court to rule on a question on which it has not yet spoken. Both *NLRB v. Walt Disney Productions,* 146 F. 2d 44 (9th Cir. 1944) and *NLRB v. Tanner Motor Lines Ltd.,* 349 F. 2d 1 (9th Cir. 1965) involved cases where the issue was not before the Court.

In *Disney,* the grievance procedure had not been utilized. In *Tanner,* the employer did not attack the Board findings on the fairness of the grievance procedure.

It is Petitioner's position that the Board should defer to the decision of the persons concerned after the union, both before and after the discharge, agrees with the discharge, and a workers committee after discussion of the incident with the employer in conformance with the grievance procedure, also agrees that the discharge was justified under the contract.

Lodge 734, IAM v. United Aircraft Corp., 337 F. 2d 5 (2d Cir. 1964) is the strongest case in support of the Board's position. In it the Court summarily dismisses the argument without case support that Petitioner here advances by stating that "The Courts ought not to transmute this Board policy into a rule of law. . . ."

337 F. 2d at 11.

It is precisely Petitioner's point that the Courts should transmute the Board policy into a rule of law in the circumstances of this case, and that such action should be taken in any case where it is clearly an abuse of the Board's discretion not to defer to the internal resolution of the dispute.[1] The decisions cited in Petitioner's Opening Brief encouraging speedy internal settlement of disputes clearly argue for such a rule.

B. It Was Error for the Board and the Trial Examiner to Admit Into Evidence and to Consider the Affidavit of Buckner in Reaching Their Decisions That Petitioner Herein Was Guilty of Violations of 8 (a) (1) and 8 (a) (3), NLRA.

The Board's position is (1) a corporation is the accused and not Buckner and (2) a Board proceeding is not criminal in nature thus, reasons the Board on the facts in this case, Buckner's (1) constitutional rights were not violated, (2) the corporation had no such rights to be violated and (3) nobody has such rights before the Board anyway.

The Board is incorrect in all particulars:

1. The precise nature of the constitutional rights of corporations and associations treated as quasi-corporations is set out by the Supreme Court in *Curcio v. United States,* 354 U.S. 118 (1957). Of course, corporate records may not be ". . . insulated from rea-

[1]It is noteworthy that the arbitration submission agreement in the *Lodge 743, IAM* case was apparently separate and apart from a collective bargaining agreement. In the instant case, the grievance procedure was an integral part of the whole agreement. The Court should be less willing to deny the enforcement of one section of an agreement, thus upsetting the delicate balance of the entire agreement.

sonable demands of governmental authorities by a claim of personal privilege on the part of their custodian."

354 U.S. at 122.

But, equally so, such officers "'. . . may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers.'"

354 U.S. at 124 (quoting from *Wilson v. United States,* 221 U.S. 361 (1912)).

Thus personal papers and personal testimony of such officers are subject to the protection of the Constitution. In this case we are dealing with a personal statement of a corporate officer. The Board would deny the rights of a considerable amount of people.[2]

2. The Board suggests that its proceedings are civil, not criminal. Petitioner has cited cases where constitutional rights have been recognized in a clearly civil case, and an administrative proceeding. The issue is whether or not criminal proceedings are *possible* against the person claiming privilege in any proceeding.

"'The privilege can be claimed in *any proceeding,* be it criminal or civil, administrative or judi-

[2]In fiscal year July, 1956-June, 1966, there were 1,427,606 corporations which filed income tax returns. *Statistics of Income 1965, Corporate Income Tax Returns,* Internal Revenue Service Pub. 159, U.S. Government Printing Office, Washington, D.C. (1966). Assuming only one officer per corporation, the Board would still remove the rights of some one and one-half million people!

cial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*' (Emphasis supplied.)"

In the Matter of The Application of Paul L. Gault, ... U.S. ....., 18 L. Ed. 2d 527, 557 (1967) (quoting from *Murphy v. Waterfront Commission,* 378 U.S. 52, 94 (1964).

It is noteworthy that in the *Gault* case, the Supreme Court was faced with a "civil" proceeding. It had no difficulty in applying the Fifth Amendment through the Fourteenth to the case. Where deprivation of liberty is threatened:

"To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."

18 L. Ed. 2d at 558.

Nor is the Fifth Amendment so limited. It reads in pertinent part:

". . . nor be deprived of life, liberty or property without due process of law . . ."

U.S. Const. Amendment V.

Of course, Buckner will be deprived of property (money) by the Board decree if enforced by this Court, and be placed in danger of being deprived of both property and liberty as well as pointed out below.

(a) Is It Reasonable That Buckner May Be Subject to a Criminal Prosecution?

The Board as yet has not been deprived of its powers to petition for criminal contempt. Against a corporation, the Board petitions to hold *its officers* in criminal contempt.

> *NLRB v. Star Metal Mfg. Co.,* 187 F. 2d 856 (1951).

And when necessary in its view it petitions to *jail* the officer. It is sometimes successful.

> "The National Labor Relations Board petitions for a writ of body attachment against respondent Stephen Vazzano, *president* and *managing agent* of respondent Savoy Laundry, Inc. (Savoy). The motion is granted." (Emphasis supplied).
>
> *NLRB v. Savoy Laundry, Inc.,* 354 F. 2d 78, 79 (2d Cir. 1965).

It is thus eminently reasonable for Buckner to conclude that his statement, relied on by the Trial Examiner and Board in its decision, may subject him to proceedings even labeled criminal.

The fact, of course, is that even if criminal safeguards are instituted at that point in time, the damage is done, the contempt petition is based on the enforcement decree which is based on the Board decision and it, in turn, on evidence not properly considered and considerable in a criminal proceeding.[3]

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[3]Such evidence would not then be subject to exclusion by collateral attack on the enforcement decree or Board decision, *NLRB v. Latex Industries,* not reported in Federal Reporter, 53 LRRM 2458 (6th Cir. 1963) contempt proceeding for disobeying decree in *NLRB v. Latex Industries,* 307 F. 2d 737 (6th Cir. 1962).

The Board also argues that Section 11 of the NLRA gave the Board power to subpoena Buckner. That, of course, is so, but it hardly precludes the utilization of the Constitutional rights of the subpoenaed person. In fact, such a procedure allows for ready review of such a claim in face of a subpoena. LMRA, Sections 11(1), (2); see *American Cyanamid Company v. Sharff,* 309 F. 2d 790 (3d Cir. 1962). The immunity granted by Section 11(3) is illusory, at best, where criminal contempt proceedings are yet available to the Board. In any event, such a formal subpoena, better calculated to alert Buckner to the seriousness of this matter, was not utilized. Instead, the Board did what was excepted from the decision of this Court cited by the Board, *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965). In that case:

> "It is clear that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation."
>
> 351 F. 2d at 902.

In the instant case, the statement was obtained through statements of the investigator which were, at the very least, highly misleading.

To this point, this section of the reply brief has been in response to the brief from the Board, since the issues raised by the Board are well-advanced and well-thought. However, the real issue is perhaps best defined in the *Miranda* case:

> "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or fed-

eral—must accord to the dignity and integrity of its citizens."

Miranda v. Arizona, 384 U.S. 436, 460 (1966).

The fact still remains that the only way to prevent such governmental practices as are evident in this case it to deny the fruits of the practice.

As recognized in the *Gault* case, the due process clause of the Fifth Amendment should apply to certain "civil" proceedings. As recognized in the *Miranda* case, the real concern of the Court should be to protect citizens from an over-reaching government. It is precisely on these basic principles of Constitutional rights, due process and fair play that this Petitioner bases its case.

Dated: February 28, 1968.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

THOMAS C. WATERMAN